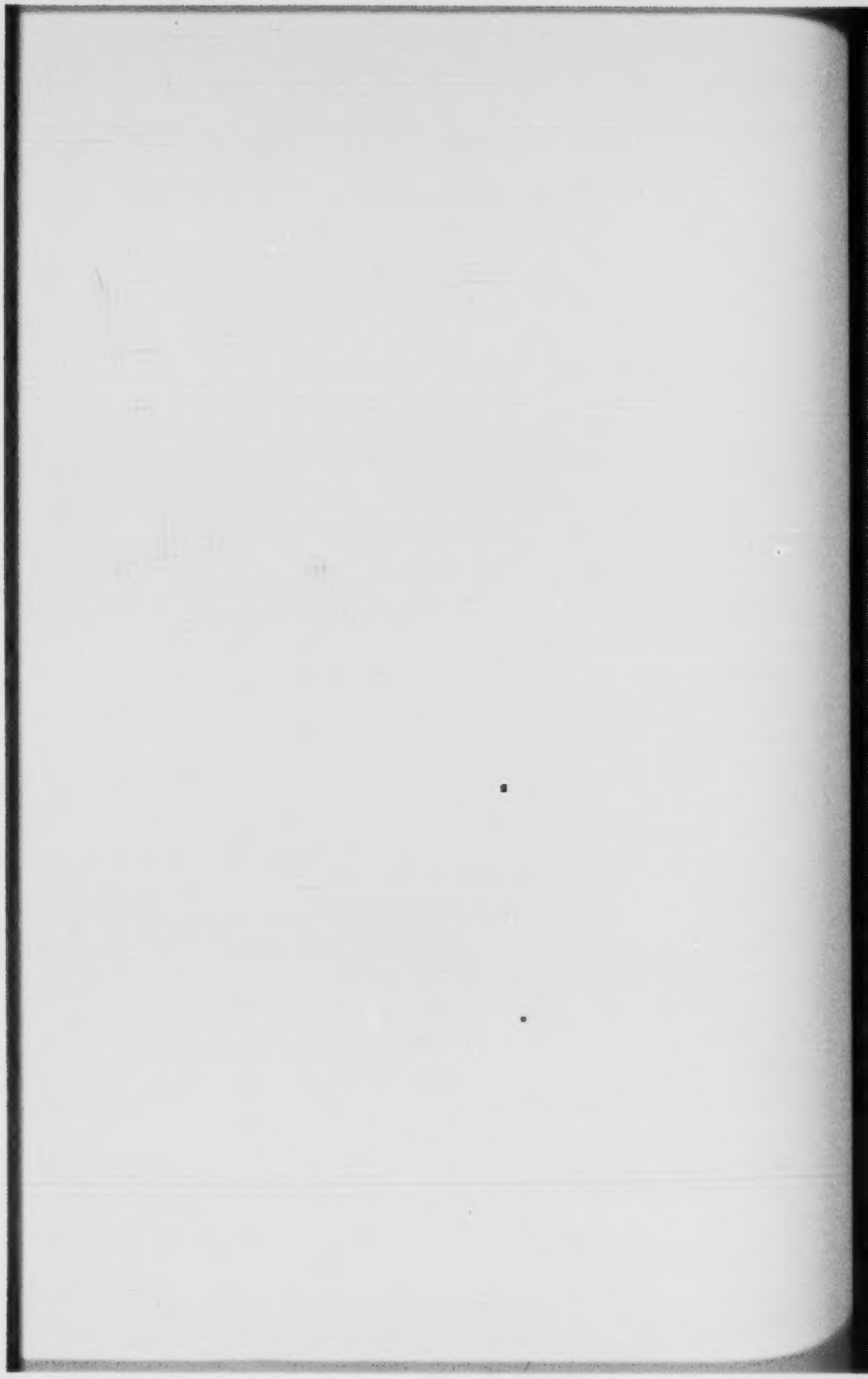

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 582

WILLIAM SQUIRE NEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 586–589) on petitioner's second appeal has not yet been reported.[1]

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 15, 1940 (R. 590). The peti-

[1] The majority and dissenting opinions in the court below on the petitioner's first appeal are reported in 102 F. (2d) 643 and are set forth in full in the Appendix to the petition for a writ of certiorari (Pet. 11–25).

tion for a writ of certiorari was filed November 19, 1940. The day after this petition was filed the petitioner filed in the Circuit Court of Appeals a motion for leave to file a petition for rehearing, accompanied by the petition (R. 592, 594–604). The motion for leave to file the petition was granted on December 3, 1940 (R. 593), and the petition was denied on the same day (R. 605). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED[2]

After his original conviction was reversed by the Circuit Court of Appeals because of the insufficiency of the evidence in a certain respect and the case remanded for a new trial, the petitioner, without objection on his part, was retried and again convicted, which second conviction was affirmed by the Circuit Court of Appeals. In a petition for re-

[2] The petitioner reserves, but does not argue, the contention that the evidence was insufficient to warrant submitting the case to the jury because it showed at most the receipt of stolen property rather than aid given to a felon (Pet. 5). The Government, therefore, does not argue the point. Attention is directed, however, to the facts set forth in the opinion of the court below on the first appeal (Pet. 16–17) and the holding of the court below on the second appeal that "the evidence was clearly sufficient to support a verdict of guilt" (R. 589).

hearing following that affirmance petitioner for the first time challenged the action of the Circuit Court of Appeals on his first appeal in directing that the case be remanded for a new trial.

The question presented by the petition for a writ of certiorari is whether the Circuit Court of Appeals in reversing the judgment of conviction on the first appeal was required to remand the case with instructions to discharge the petitioner for the reasons that (1) a second trial would constitute double jeopardy, (2) a retrial was precluded under the doctrine of *res judicata,* and (3) the ends of justice require a reversal with instructions to discharge the defendant where a Circuit Court of Appeals holds that the evidence is insufficient.[3]

STATEMENT

In February 1938 the petitioner's brother, John L. Neal, was indicted in ten counts for stealing various sums of money from a national bank. He pleaded guilty to five counts of this indictment and was sentenced to the penitentiary. Theft from a national bank was first made an offense by the amendment of August 24, 1937 c. 747, 50 Stat. 749, to Section 2 (a) of the Act of May 18, 1934 c. 304,

[3] This question raises the further questions whether the petitioner waived his privilege against double jeopardy by appealing from his original conviction, whether *res judicata* can be invoked for the first time on appeal, and whether the petitioner timely challenged the action of the Circuit Court of Appeals in remanding the case for a new trial.

48 Stat. 783 (U. S. C., Title 12, Sec. 588 (b)) and the indictment was predicated on this amendment (Pet. 12–13).[4]

Petitioner has been tried twice on a separate indictment charging him with being an accessory after the fact with respect to the offense for which his brother John was convicted.[5] It was charged that he became an accessory after the fact on January 7, 1938, in that he aided in secreting the proceeds of the felony by concealing some $5,000 of the money which John had stolen, thus suppressing important evidence to the end that John might escape punishment (R. 3–5). On the first trial petitioner was convicted and sentenced to imprisonment for two years. On appeal, the petitioner asserted, *inter alia,* that his motion for a directed verdict should have been granted (Pet. 12). The Circuit Court of Appeals found that petitioner knew that John had committed the offense charged against him (Pet. 17) and intimated that the money which petitioner had secreted was a part of the

[4] All "Pet." references in this statement are to the majority opinion of the court below on the first appeal as printed in the Appendix to petitioner's brief (Pet. 11–23).

[5] This statement of facts pertains only to the first count of the indictment in two counts against the petitioner. The second count charged misprision of the same felony with respect to which petitioner was by the first count charged to have been an accessory after the fact (R. 5–6). Since the judgment on the second count was reversed on the first appeal and since petitioner was acquitted on that count at the second trial, the second count is not now involved.

money which John had stolen from the national bank over a period of seven years (Pet. 16, 17). The court held, however, that the petitioner's motion for a directed verdict should have been granted because the Government had failed sufficiently to prove that any part of the moneys concealed by the petitioner had been stolen by John after August 24, 1937, the date upon which it became a Federal offense to steal moneys from a national bank (Pet. 18). The court, therefore, reversed the judgment of conviction for insufficiency of the evidence, and remanded the case with instructions to grant a new trial (Pet. 23).

The petitioner did not attack the remanding of the case for a new trial either by a petition for rehearing in the Circuit Court of Appeals or by a petition to this Court for a writ of certiorari, and a second trial for the same offense was had without any objection on the part of petitioner. On that trial the Government undertook to prove that a part of the money concealed by the petitioner was stolen by John after August 24, 1937 (R. 587). Petitioner was again found guilty (R. 19) and sentenced to two years imprisonment and to a fine of $500 (R. 24–25). Upon appeal the petitioner again contended that the trial court should have granted his motion for a directed verdict, but the Circuit Court of Appeals held that upon the evidence the jury was warranted in finding that all of the money concealed by the petitioner was stolen

from the national bank and that part of it was stolen after August 24, 1937 (R. 589). The court accordingly affirmed the judgment of conviction. Thereafter, by leave of the Circuit Court of Appeals, the petitioner filed in that court a petition for rehearing attacking for the first time the action of the Circuit Court of Appeals in remanding the case for a new trial on the first appeal (R. 594–604).

ARGUMENT

(1) There is clearly no merit in the petitioner's contention that the Circuit Court of Appeals was powerless on the first appeal to remand the case for a new trial because of the double jeopardy doctrine. Assuming that double jeopardy may ever result from a second trial in the same case,[6] it is settled that where, as here, a defendant appeals from the judgment of conviction and obtains a reversal, he thereby waives his right to plead at the second trial that he has been once in jeopardy. *United States* v. *Ball,* 163 U. S. 662, 671; *Trono* v. *United States,* 199 U. S. 521, 533, 534; *Murphy* v. *Massachusetts,* 177 U. S. 155, 158; *Stroud* v *United States,* 251 U. S. 15, 18.[7] The

[6] See, however, Mr. Justice Holmes' dissenting opinion in *Kepner* v. *United States*, 195 U. S. 100, 134–135, and the opinion of the Court, written by Mr. Justice Cardozo, in *Palko* v. *Connecticut*, 302 U. S. 319, 322–323.

[7] Even in a case where a defendant is twice placed in jeopardy by a second trial, it has been uniformly held that he waives his privilege against double jeopardy by pro-

gist of these decisions is that the accused waives his privilege against double jeopardy because he has himself invoked the action of the appellate court which resulted in a further trial.

Petitioner asserts, however, that waiver of double jeopardy by appeal does not exist where the reversal occurs for insufficiency of the evidence because public policy dictates that the Government should have but one opportunity to make out a case against the defendant, but does exist in those cases in which the reversal results because of error in the admission or exclusion of evidence, erroneous instructions to the jury, misconduct of counsel, etc., for the reason that "In cases of the latter character, it may be said that there is no jeopardy because no trial at all, in the legal sense, resulted" (Pet. 9). Petitioner cites no authorities in support of this attempted distinction, and there is nothing in any of the decisions which deal with waiver of jeopardy by appeal which makes the application of the doctrine depend upon the ground or grounds upon which the reversal was predicated. There is as much reason for applying the waiver doctrine in one case as in the other, since in each the new trial

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ceeding to trial without asserting the privilege. *Levin* v. *United States*, 5 F. (2d) 598, 600 (C. C. A. 9th), certiorari denied, 269 U. S. 562; *Brady* v. *United States*, 24 F. (2d) 399, 405 (C. C. A. 8th); *Bracey* v. *Zerbst*, 93 F. (2d) 8, 9–10 (C. C. A. 10th). Here the question was first raised on petition for rehearing after affirmance by the Circuit Court of Appeals of petitioner's conviction on the second trial.

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was brought about by the action of the accused himself in appealing and securing a reversal of his conviction.

Ex parte Nielsen, 131 U. S. 176, cited by the petitioner, does not aid him. In that case there was no waiver of double jeopardy by appeal or otherwise.[8]

(2) Petitioner does not elaborate his contention that the reversal and remanding of the case for a new trial on the first appeal violated the doctrine of *res judicata*. On that appeal the Circuit Court of Appeals held that the evidence was inadequate because it did not sufficiently establish that the money concealed was money stolen from the national bank after August 24, 1937. This issue was not attempted to be relitigated at the second trial, the appellate court's decision was respected as the law of the case, and the Government's evidence was directed to supplying the deficiency in proof found by the appellate court.[9]

(3) The petitioner contends that the Circuit Court of Appeals was required, when it reversed

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[8] Since double jeopardy did not result because of petitioner's second trial, it would be profitless to discuss his contention that the defense of double jeopardy may be first made on appeal where it turns upon a question of law appearing on the face of the record as distinguished from some question of fact (Pet. 4). See, however, cases cited in footnote 7, *supra*, p. 6.

[9] It has also been held that the question *of res judicata* cannot be considered on appeal where, as here, it was not raised below. *Adams* v. *Shirk*, 117 Fed. 801 (C. C. A. 7th); *DeRees* v. *Costaguta*, 275 Fed. 172 (C. C. A. 2d), certiorari denied, 257 U. S. 648.

his conviction on the first appeal for insufficiency of the evidence, to order that he be discharged and that it should not have not remanded the case for a new trial. We submit (a) that the petitioner is not in a position to urge this contention and (b) that in any event the contention is without merit.

(a) The petitioner did not attack the judgment of the Circuit Court of Appeals remanding the case for a new trial either by a petition for rehearing or by a petition to this Court for a writ of certiorari. On the contrary he submitted to a second trial without objection and did not question the propriety of his retrial until after the court below had affirmed his second conviction. Under these circumstances, we submit that petitioner's challenge to the judgment of the Circuit Court of Appeals came too late, particularly since, as is hereinafter indicated, the action of the Circuit Court of Appeals in remanding the case for a new trial was, at most, the exercise of a discretionary power. The proper administration of justice requires that a defendant seek direct and prompt review of alleged error by an appellate court.

(b) Petitioner cites no decision which supports his view that a Circuit Court of Appeals, when it holds that a motion for a directed verdict should have been granted for insufficiency of the evidence, is required to direct that the defendant be discharged. He asserts, however, that the Circuit Court of Appeals should have ordered his dis-

charge because he would have been released on the spot if the trial court had granted his motion for a directed verdict as the Circuit Court of Appeals held it should have done.

In *Collenger* v. *United States,* 50 F. (2d) 345,[10] the only Federal case in which the question was directly presented, motions for a directed verdict had been overruled, the Government conceded on motions for arrest of judgment that the evidence was insufficient, and the defendants contended both in the District Court and in the Circuit Court of Appeals that their discharge should be ordered because a verdict for their acquittal should have been directed by the District Court and that had this been done they could not again be tried on the same charge. The Circuit Court of Appeals for the Seventh Circuit held, however, that it had no right to discharge a defendant where the evidence was inadequate but was required under the decision of this Court in *Slocum* v. *New York Life Ins. Co.,* 228 U. S. 364,[11] to remand the case for a new trial. The defendants filed in this Court a petition for a writ of certiorari in which the sole question presented was the correctness of this ruling. This Court, however, denied certiorari (284 U. S. 654).

[10] Followed in *Caringella* v. *United States*, 78 F. (2d) 563, 567 (C. C. A. 7th).

[11] The *Slocum* decision was re-affirmed by this Court in *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389, 394.

In *Ex Parte United States,* 101 F. (2d) 870 (affirmed by an equally divided court, *United States* v. *Stone,* 308 U. S. 519), in which the Circuit Court of Appeals for the Seventh Circuit upheld the right of a trial judge to render a judgment *non obstante veredicto* pursuant to the reservation of a ruling on a motion for a directed verdict, the court stated that the effect of its decision in the *Collenger* case was to condemn a judgment *non obstante veredicto* made without reservation (p. 877, note 21). It is, therefore, evident that the court in the *Collenger* case felt that it was compelled to remand the case for a new trial because a discharge of the defendants would have been tantamount to a judgment *non obstante veredicto* without reservation. This but recognizes that since a trial court cannot, at least without reservation, set aside a verdict of guilty upon reaching the conclusion that the evidence is insufficient, except by granting a new trial,[12] a Circuit Court of Appeals is equally powerless to do so.

Petitioner does not refer to the *Collenger* case but questions the soundness of the *Slocum* decision [13] and its application to Federal criminal cases.

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[12] A motion for arrest of judgment cannot be based upon insufficiency of the evidence to support the verdict. *United States* v. *Stern,* 186 Fed. 854 (D. E. D. Penn.), aff'd 193 Fed. 888 (C. C. A. 3d); *United States* v. *Marrin,* 159 Fed. 767 (D. E. D. Penn.), aff'd 167 Fed. 951 (C. C. A. 3d), certiorari denied, 223 U. S. 719.

[13] In this connection petitioner refers (Pet. 5–6) to Rule 50 of the New Civil Procedure Rules providing for auto-

His position is that a Federal appellate court has the power to dispose of a criminal case as right and justice may require [14] and that the ends of justice require that where a Circuit Court of Appeals reverses a conviction for insufficiency of the evidence it should remand the case with directions to discharge the defendant.

It is unnecessary here to consider either the soundness of the *Slocum* case or its application to criminal cases. For there is nothing to show that the court below proceeded on the assumption that it was required to grant a new trial. And clearly it was not required to order the discharge of the defendant. We have found no decision which so holds and the petitioner has cited none. Indeed, where a judgment of conviction is reversed because the trial court erroneously failed to direct a verdict in favor of the defendant, it is the frequent practice for the Circuit Courts of Appeals to order a new trial. For example, see *Backun* v. *United States,* 112 F. (2d) 635, 639 (C. C. A. 4th); *Leslie* v. *United States,* 43 F. (2d) 288 (C. C. A. 10th); *Ridenour* v. *United States,* 14 F. (2d) 888 (C. C. A. 3d); *Holmes* v. *United States,* 275 Fed. 49 (C. C. A. 4th); *Duff* v. *United States,*

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matic reservation of decision on a motion for a directed verdict. It suffices to say that there is no similar rule with reference to Federal criminal procedure.

[14] Citing *Ballew* v. *United States,* 160 U. S. 187, and various lower Federal court decisions.

185 Fed. 101 (C. C. A. 4th). And, of course, even in the absence of such a direction a new trial is had unless the opinion of the appellate court clearly shows that the court to which its mandate is directed must follow some other course. Cf. *Stroud* v. *United States,* 251 U. S. 15, 17; *Steinman* v. *United States,* 185 Fed. 47 (C. C. A. 3d).

It would, we submit, have been contrary to the ends of justice for the Circuit Court of Appeals in the instant case to have directed the petitioner's discharge upon the reversal of his first conviction. The ends of justice demand that, except where double jeopardy constitutes a barrier (Cf. *Cornero* v. *United States,* 48 F. (2d) 69 (C. C. A. 9th)), a person guilty of a crime be convicted and punished. In the instant case the two opinions of the Circuit Court of Appeals make it manifest that at the first trial the Government had abundantly proved all of the elements of the offense charged against the petitioner (see Pet. 17; R. 587) except that, in the view of two of the judges, it had failed sufficiently to establish that any part of the stolen money concealed by the petitioner was taken from the national bank after August 24, 1937, when it first became a Federal offense to steal money from such a bank. Plainly, under these circumstances, the ends of justice did not dictate that the Circuit Court of Appeals should have allowed the peti-

tioner to go free, particularly when there was no reason for that court to believe that the Government would be unable to supply the deficiency in proof which the court had pointed out. In a somewhat analogous situation the Circuit Court of Appeals for the Fourth Circuit, in *Backun* v. *United States,* 112 F. (2d) 635, 639 *supra,* in reversing a conviction for insufficiency of the evidence in certain respects and in remanding the case for a new trial, said that "It may be that, upon such new trial, it will be possible to identify additional silver in the possession of Zucker as having been stolen, or to show otherwise that the value of the stolen silver transported in interstate commerce came within the valuation fixed by the statute." See also *Caringella* v. *United States,* 78 F. (2d) 563, 567 (C. C. A. 7th), *supra.*

Cornero v. *United States,* 48 F. (2d) 69 (C. C. A. 9th), cited by the petitioner, is clearly not in point. In that case the Circuit Court of Appeals, in view of its finding that the defendant's plea of former jeopardy was meritorious and timely, was of course required to discharge him. In the instant case, as we have heretofore shown, there is involved no question of double jeopardy.

CONCLUSION

Petitioner's contentions are clearly without merit and there is involved no conflict of decisions.

We therefore respectfully submit that the petition for writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.
WENDELL BERGE,
Acting Assistant Attorney General.
RAOUL BERGER,
Special Assistant to the Attorney General.
GEORGE F. KNEIP,
W. MARVIN SMITH,
Attorneys.

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